Supreme Court of the United States

OCTOBER TERM, 1933

No. 44

L. M. DAKIN (Successor to A. M. Anderson),
As Receiver of the First National Bank
of St. Petersburg, PETITIONER,

vs.

TAVER BAYLY, As Liquidator of the
Peoples Bank of Clearwater, RESPONDENT.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT.

BRIEF OF PETITIONER.

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ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT.

BRIEF OF PETITIONER.

I.
OPINION AND JUDGMENT BELOW.

The opinion of the Circuit Court of Appeals for the Fifth Circuit (Bryan, Circuit Judge) is reported in 63 F. (2) 592, and appears at page 20 in the record. The judgment of the United States District Court for the Southern District of Florida (Akerman, D. J.) is not reported, but appears in the record at page 16.

II.
JURISDICTION.

Writ of certiorari was granted May 29, 1933, (R. 23).

III.
STATEMENT OF THE CASE.

This action was brought by A. M. Anderson, as receiver of the First National Bank of St. Petersburg, Florida, in the District Court of the United States, Southern District (R. 1) against the Peoples Bank of Clearwater, Florida, to recover a balance of $2,631.30, representing funds collected by the Peoples Bank for the First National Bank. The defendant (Peoples Bank, respondent here) pleaded set-off based on four drafts drawn by the First National Bank of St. Petersburg in favor of the Peoples Bank, aggregating $2,898.20 which were unpaid by reason of the insolvency and suspension of the First National Bank of St. Petersburg. Plaintiff's replications alleged that the drafts were drawn in remittance for checks or drafts deposited with the Peoples Bank for collection and forwarded by the Peoples Bank to the First National Bank for collection. The respondent demurred to the replications (R. 10 and 15), the demurrer was sustained, resulting in a judgment for respondent (R. 16), which was affirmed by the Circuit Court of Appeals for the Fifth Circuit (R. 20). The petitioner, L. M. Dakin, was substituted for A. M. Anderson, the plaintiff in the District Court, appellant in the Circuit Court of Appeals, and now

seeks a review of the opinion and judgment of that court.

The facts in the case are not in dispute.

Prior to June 7, 1930, the First National Bank of St. Petersburg had forwarded two cash letters, in the respective amounts of $2,540.34 and $90.96, totalling $2,631.30, for collection and remittance, to the Peoples Bank of Clearwater, and on June 7, 1930, that bank had collected said sum of $2,631.30 and was indebted to the First National Bank of St. Petersburg in this amount.

On the same day the First National Bank of St. Petersburg was indebted to the Peoples Bank of Clearwater in the sum of $2,898.40, which the St. Petersburg bank had collected for the Clearwater bank under a collection and remittance agreement. The First National Bank attempted to remit payment to the Peoples Bank by drafts as follows:

June 4, 1930, draft for Three Hundred Forty-five and 69/100 Dollars ($345.69) on Chase National Bank of New York; June 5, 1930, draft for One Thousand Five Hundred Twelve and 62/100 Dollars ($1512.62) on Chase National Bank of New York; June 6, 1930, draft for Three Hundred Thirty-two and 21/100 Dollars ($332.21) on Chase National Bank of New York; and June 7, 1930, draft for Seven Hundred Seven and 88/100 Dollars ($707.88) on Chase National Bank of New York.

The First National Bank of St. Petersburg was closed and placed in the hands of a receiver, A. M.

Anderson, by the Comptroller of the Currency on June 9, 1930, at which time these drafts were outstanding and unpaid. The District Court allowed the set-off claimed by the Peoples Bank of Clearwater and entered judgment against the receiver of the First National Bank of St. Petersburg for the excess amount.

In affirming the judgment and allowing the set-off the Circuit Court of Appeals held that it was a matter of no concern to the appellant (Receiver—First National Bank—Petitioner here) whether the Clearwater bank held the items deposited by its customers for collection or for value, inasmuch as it had the right to maintain an action in its own name against the appellant for the amount due it, notwithstanding the fact that beneficial ownership in the items forwarded for collection, as a matter of law, vested in the forwarding bank's customers.

IV.

SPECIFICATION OF ERRORS.

(a) The Circuit Court of Appeals erred in holding that it was a matter of no concern to the receiver of the insolvent First National Bank of St. Petersburg, and his depositors-creditors, whether the Clearwater bank held the items deposited by its customers for collection or for value.

(b) The Circuit Court of Appeals erred in holding that the right to maintain a suit in the name of the Clearwater bank, irrespective of ownership of the items upon which the set-off was based, gave the

Clearwater bank the right to set-off, in a suit against it by the receiver of the St. Petersburg bank for the amount of the Clearwater bank's indebtedness to it.

(c) The Circuit Court of Appeals erred in holding that mutual debts were due to and from the Clearwater bank and the St. Petersburg Bank in the same capacity.

V.
ARGUMENT SUMMARIZED.

(1) The National Bank Act constitutes a complete code in itself governing the distribution of the assets of such failed banking associations, Cook County National Bank v. United States, 107 U. S. 445, and the Federal rule, which controls, United States v. Robeson, 9 Peters 319, 9 L. Ed. 142, (as it involves a matter of substantive law, The Gloria, 286 Fed. 188,) provides that distribution of the assets of an insolvent national bank must be made in accordance with Section 5236 U. S. R. S. (12 U. S. C., ch. 2, sec. 194) which requires a pro rata distribution of such assets to the bank's creditors.

(2) The requirement as to ratable dividends is to make them from what belongs to the bank, not what belongs of right to a debtor-depositor, hence where a set-off is otherwise valid its allowance cannot be considered a preference, Scott v. Armstrong, 146 U. S. 499; but where the set-off is not allowable by law its allowance effects a preference in the application of the bank's assets and defeats the mandate of the National Bank Act securing a ratable distribution of such assets among the bank's creditors.

(3) The right of set-off, non-existent at common law, was introduced and provided for by statute of 2 Geo. II, ch. 24, sec. 4, made permanent by the statute of 8 Geo. II, ch. 24, secs. 4 and 5, which enacted that where mutual debts exist between the plaintiff and defendant one debt may be set off against the other in order to avoid circuity of action and injustice. United States v. Eckford, 6 Wall. 484; North Chicago Rolling Mill Company v. St. Louis Ore and Steel Company, 152 U. S. 596. Most of the states of the United States have created the right of set-off by statute, and in Florida the right is governed by Section 4326, Compiled General Laws of Florida, 1927, providing for offset of mutual debts or demands existing between parties at the commencement of the action.

(4) The rule of law in set-off requires mutuality of parties and demand; these requirements contemplate mutuality of parties, Beauregard v. Case, 91 U. S. 134; mutuality of right, Gray v. Rollo, 18 Wall. 629; and mutuality in quality of right, Scammon v. Kimball, Assignee, 92 U. S. 362; Sawyer v. Hoag, 84 U. S. 610. The third requirement, mutuality in quality of right, in offset, is fundamental and is based on the sound legal question "to whom does the money or the claim actually belong, differently stated, is the party seeking to obtain the benefit of the offset the real owner of the claim". Thomas v. Potter Title & Trust Company, 2 Fed. Supp. 12; Gordon v. Union Trust Company, 308 Pa. 493; McGraw v. Pettibone, 10 Mich. 530. The claim of ownership must stand two tests: (1) Can plaintiff bring suit in his own name? (2) If so, would he be entitled to retain the

money or property recovered as his own? Thomas v. Potter Title & Trust Company, 2 Fed. Supp. 12; Olmstead v. Scutt, 55 Conn. 125; McGraw v. Pettibone, 10 Mich. 530. The right to set-off must exist at the moment of insolvency and suspension, for the rights of the parties are fixed as of that time. Scott v. Armstrong, 146 U. S. 499, Yardley v. Philler, 167 U. S. 344. McCandless v. Dyar, 34 Fed. (2) 989.

(5) It is a well settled rule of Federal law that, in the absence of a controlling statute or contract, the unrestricted endorsement of commercial paper deposited by a customer in a bank passes title to the paper, the bank becomes the owner of the paper, and the depositor the creditor of the bank, City of Douglas v. Federal Reserve Bank of Dallas, 271 U. S. 489, but here the relations of the parties are controlled by Section 6834, Compiled General Laws of Florida, 1927, which determined the rule of law governing the rights of the parties, under which rule the bank in which the items were deposited was a mere collecting agent for its customers, Federal Reserve Bank of Richmond v. Malloy Brothers, 264 U. S. 160, City of Miami v. First National Bank of St. Petersburg, 58 Fed. (2) 681.

(6) By reason of this relationship it results that beneficial ownership of the items deposited remained in the forwarding bank's customers until collection of such items was made by the forwarding bank in cash or solvent credits, which result would have terminated the principal-agent relationship and established the relation of debtor-creditor, at which time title and ownership of the items would have passed to the bank, Commercial Bank of Pa. v. Armstrong, 148 U.

S. 50; Washington Loan & Banking Co. v. 4th Nat. Bank, 38 Fed. (2) 772. In the case at bar collection in cash or solvent credits never was effected by the forwarding bank, the agency relation of the Clearwater bank to its customers continued to exist down to the moment of insolvency and suspension of the St. Petersburg bank; the Clearwater bank held the remittance drafts as trustee for the beneficial owners, its depositors, in which situation mutuality in quality of right in offset did not exist, and the allowance of the set-off claimed would constitute an illegal preference of some of the creditors of the insolvent St. Petersburg bank over others in violation of the equal and ratable distribution rule provided for in the National Bank Act.

VI.

ARGUMENT.

A SET-OFF SHOULD NOT BE ALLOWED THE RESPONDENT, PEOPLES BANK OF CLEARWATER, BECAUSE BENEFICIAL OWNERSHIP OF THE ITEMS DEPOSITED WITH IT FOR COLLECTION AND CREDIT, AND LIKEWISE THE DRAFTS FORWARDED BY THE FIRST NATIONAL BANK OF ST. PETERSBURG IN REMITTING PAYMENT FOR SUCH COLLECTION ITEMS, REMAINED IN THE CLEARWATER BANK'S CUSTOMERS AND SO STOOD WHEN THE FIRST NATIONAL BANK SUSPENDED.

(1) *The rule governing the distribution of assets of an insolvent national bank stated.*

In Cook County National Bank v. United States, 107 U. S. 445, 448, the court said, in discussing the act authorizing the formation of national banks, that

> "We consider that act as constituting by itself a complete system for the establishment and government of national banks, prescribing the manner in which they may be formed, . . . Everything essential to the formation of the banks, the issue, security, and redemption of their notes, the winding up of the institutions, and the distribution of their effects, are fully provided for, as in a separate code by itself."

As pointed out in Cook County National Bank v. United States, supra, after providing for the appointment of a receiver by the Comptroller of the Currency upon the suspension or failure of a national bank, the law requires the receiver to take possession of its books, records and assets, to collect all debts and claims belonging to it, to sell or compound bad or doubtful debts, and the real or personal property of the bank, upon an order of a court of competent jurisdiction, and, if necessary in order to pay its obligations, to enforce the individual liability of its shareholders. It requires the Comptroller, upon appointing a receiver to cause notice to be published, calling upon all persons having claims against the bank to present the same with legal proof thereof. It then declares in Section 5236 as follows:

> "Dividends on adjusted claims; distribution of assets. From time to time, after full provision has been first made for refunding to the United States any deficiency in redeeming the notes of such association, the comptroller

shall make a ratable dividend of the money so paid over to him by such receiver on all such claims as may have been proved to his satisfaction or adjudicated in a court of competent jurisdiction, and, as the proceeds of the assets of such association are paid over to him, shall make further dividends on all claims previously proved or adjudicated; and the remainder of the proceeds, if any, shall be paid over to the shareholders of such association, or their legal representatives, in proportion to the stock by them respectively held. (R. S. 5236.)"

Then in Davis v. Elmira Savings Bank, 161 U. S. 275, 285, the court, referring to this section, said:

"In National Bank v. Colby, 21 Wall., 609, 613, 614, the court said:

"'As to the general creditors, the act evidently intends to secure equality among them in the division of the proceeds of the property of the bank. . . .

"'The fifty-second section, further to secure this equality, declares that all transfers by an insolvent bank of its property of every kind, and all payments of money made after the commission of an act of insolvency, or in contemplation thereof, with a view to prevent the application of its assets in the manner prescribed by the act, or "with the view to the preference of one creditor over another, except in the payment of its circulating notes," shall be utterly null and void.

"'There is in these provisions a clear manifestation of a design on the part of Congress: 1st, to secure the government for the payment

of the notes, not only by requiring, in advance of their issue, a deposit of bonds of the United States, and by giving to the government a first lien for any deficiency that may arise on all the assets subsequently acquired by the insolvent bank; and, 2d, to secure the assets of the bank for ratable distribution among its general creditors.

"'This design would be defeated if a preference in the application of the assets could be obtained by adversary proceedings.'"

Not withstanding Section 721 of the Revised Statutes of the United States (United States Code, Title 28, Section 725), which provides that the laws of the several states, except where the Constitution, treaties, or statutes of the United States otherwise require or provide, shall be regarded as rules of decision in trials at common law, in the courts of the United States, in cases where they apply, it is submitted that the Federal courts are not bound by the decisions or statutes of the state courts on what constitutes the principles of substantive law but will follow the Federal precedents, or will determine what the general or fundamental law is for themselves, independent of state statutes and decisions. It has been so held in First National Bank of Shenandoah v. Liewer, 187 Fed. 16, 18:

"And it is the duty of the national courts to exercise their independent judgments in determining all questions of general commercial law, of general jurisprudence, and of right under the Constitution and laws of the United States. They are not controlled by the decisions of

state courts on questions of general commercial law. Railroad Company v. National Bank, 102 U. S. 14, 57, 26 L. Ed. 61."

The matter would appear to be concluded by the early decision of United States v. Robeson, 9 Peters, 319, 323, where the court said:

> "The first question which arises on these exceptions is, whether a claim which has been transferred to the defendant, forms a proper subject of set off, under the acts of congress, to a demand of the government. If this question shall be decided in the negative, it will not be necessary to inquire whether the claim in itself constitutes a proper item of set-off. It seems to have been presented to the proper accounting officer of the government as a credit, and that he refused to allow it. This is a question which arises, exclusively, under the acts of congress, and no local law or usage can have any influence upon it. The rule as to set-off in such cases must be uniform in the different states; for it constitutes the law of the courts of the United States, in a matter which relates to the federal government."

The foregoing statutes, decisions and discussion clearly establish three principles, (a) distribution of the assets of insolvent national banks must be made ratably among its creditors, (b) the right to set-off is a matter of substantive law, and (c) in its application by the Federal courts the Federal rule prevails.

(2) *The allowance of set-off as a preference discussed.*

There can be no question but that the National Bank Act definitely determines the obligations resting upon the Comptroller of the Currency with respect to the distribution of assets of an insolvent national bank. This Act, together with the pronouncements of this court construing it, of necessity, precludes a preference of one creditor over another. On the question as to whether or not a claim for offset may or may not be considered a claim for preference the statement of this court in Scott v. Armstrong, 146 U. S. 499, 510, is pertinent:

> "Where a set-off is otherwise valid, it is not perceived how its allowance can be considered a preference, and it is clear that it is only the balance, if any, after the set-off is deducted which can justly be held to form part of the assets of the insolvent. The requirement as to ratable dividends, is to make them from what belongs to the bank, and that which at the time of the insolvency belongs of right to the debtor does not belong to the bank."

It must be conceded that where the legal right to set-off exists its allowance cannot be considered a preference, but, conversely, where the set-off right does not exist as a matter of law it is clear that its allowance effects a preference in the application of the bank's assets, in that it takes moneys belonging to other depositors or creditors to effect a full 100% payment to the offset claimant, and operates to defeat the express mandate of the National Bank Act securing a ratable distribution of the bank's assets among its creditors. It is respectfully urged that the court had this principle in mind in National Bank v.

Colby, 21 Wall. 609, 614, and Davis v. Elmira Savings Bank, 161 U. S. 275, 285, when it said:

> "This design would be defeated (referring to the requirement for a ratable distribution of the bank's assets to its creditors) if a preference in the application of the assets could be obtained by adversary proceedings."

(3) *The right of set-off discussed.*

The right of set-off, non-existent at common law, was introduced and provided for by statute of 2. Geo. II, ch. 24, sec. 4, made permanent by the statute of 8 Geo. II, ch. 24, secs. 4 and 5, which enacted that where mutual debts exist between the plaintiff and defendant one debt may be set off against the other in order to avoid circuity of action and injustice. United States v. Eckford, 6 Wall. 484, North Chicago Rolling Mills Company v. St. Louis Ore and Steel Company, 152 U. S. 596. In the case of The Gloria, 286 Fed. 188, 192, 193, Circuit Judge Mack, concerning this aspect of the law, said:

> "With respect to the specific questions here to be decided, it must be remembered that the law of set-off and counterclaim is of relatively recent development. Recoupment only was known to the common law, and a restricted right of set-off first developed in equity. Even the limited right of set-off, properly so called, was never recognized at common law, but was introduced by the statute of 2 Geo. II, c. 22, sec. 13, made permanent by the statute of 8 Geo. II, c. 24, secs. 4 and 5 Cf. also earlier St. 4 and 5 Anne, c. 17, authorizing set-off in bankruptcy.

> The broader right of counterclaim and affirmative relief was an even more modern innovation. The right of counterclaim and set-off having been first introduced as a part of our procedural law, halting recognition is just beginning to be given to the fact that the right as between litigants is something more than a procedural convenience and is really a requirement of substantive justice. That the right of set-off and counterclaim is regarded in our law today as affecting, in important aspects, the substantive relations between the parties, is clearly seen in the rules as to the assignment of choses in action being subject to existing set-offs or counterclaims. It is interesting to note that in Roman law, too, the right of set-off was at first grudgingly recognized as part of the adjective law and only gradually accepted as a part of the substantive law. Girard, Manuel Elementaire de Droit Romain (4th Ed.), pp. 701-708; Buckland, A Text-Book of Roman Law, pp. 696-700."

Practically all of the states of the United States have created the right of set-off by statute, and in Florida, where this action arose, the right is governed by Section 4326, Compiled General Laws of Florida, 1927, which follows:

> "All debts or demands mutually existing between the parties at the commencement of the action, whether the same be liquidated or not, shall be proper subjects of set-off, and may be pleaded accordingly."

(4) ***The rule of law in set-off requiring mutuality of parties, mutuality of right, and mutuality in quality of right discussed.***

The court below considered that either bank had the right to plead set-off, if sued, because mutual debts were due to and from them in the same capacity, basing such conclusion on the premise that "since the Clearwater bank had the right to maintain a suit in its own name for the amount due it by appellant it had the right of set-off in a suit against it by appellant for the amount of its indebtedness to the St. Petersburg bank." The court thought it was a matter of no concern to the appellant (petitioner here) whether the Clearwater bank held the checks of its depositors for collection or for value. This presents the basic question as to whether or not the third requirement in set-off, mutuality in quality of right, is essential in determining the legal rights of the parties litigant. We seek to establish the doctrine announced by the lower court as erroneous, as a matter of law, and assert that this court, in Scammon v. Kimball, Assignee, 92 U.S. 362, 367, repudiates the lower court's rule and conclusively settles the prevailing law in the Federal courts:

> "Whether the suit be one at law or in equity, set-off must be understood as that right which exists between two parties, each of whom, under an independent contract, owes an ascertained amount to the other to set off their respective debts by way of mutual deduction, so that, in any action brought for the larger debt, the residue only, after such deduction, shall be recovered. Adam's Eq., 6th Am. Ed., 447.
>
> "Courts of equity, following the law, will not allow a set-off of a joint debt against a separate debt, or of a separate debt against a joint debt; nor will such courts allow a set-off

> of debts accruing in different rights, except under very special circumstances, and where the proofs are clear and the equity is very strong. 2 Story's Eq., 6th Ed., sect. 1437 . . ."

The principles and rules we earnestly urge should be adopted and followed by this court are so well stated in Thomas v. Potter Title & Trust Company, 2 Fed. Supp. 12, that we quote in extenso from that case. The facts were that Thomas, Receiver of the Bank of Pittsburgh, N. A., brought suit against the Potter Title & Trust Company for $135,787.39, representing funds of the insolvent bank on deposit in the Potter Title & Trust Company at suspension of the Bank of Pittsburgh, N. A. The Title & Trust Company had on deposit in the Bank of Pittsburgh, N. A., an account designated "Potter Title and Trust Company Trust Account", and asserted the right to set-off. The court, reviewing fundamental principles of law, including the basic question of quality of right in set-off, presented in this action, said:

> "Is defendant entitled to the set-off claimed? What laws shall govern in the determination of this question, the laws of Pennsylvania or the laws of the United States? Rev. St. §721 (28 U. S. C. §725 ((28 USCA §725)) provides: 'The laws of the several States, except where the Constitution, treaties, or statutes of the United States otherwise require or provide, shall be regarded as rules of decision in trials at common law, in the courts of the United States, in cases where they apply.'
>
> "In Swift v. Tyson, 16 Pet. 1, 19, 10 L. Ed. 865, a leading case, the Supreme Court, in con-

struing the above act, said: 'And we have not now the slightest difficulty in holding, that this section, upon its true intendment and construction, is strictly limited to local statutes and local usages of the character before stated, and does not extend to contracts and other instruments of a commercial nature, the true interpretation and effect whereof are to be sought, not in the decisions of the local tribunals, but in the general principles and doctrines of commercial jurisprudence. Undoubtedly, the decisions of the local tribunals upon such subjects are entitled to, and will receive, the most deliberate attention and respect of this court; but they cannot furnish positive rules, or conclusive authority, by which our own judgments are to be bound up and governed.'

"In Gray v. Rollo, 85 U. S. (18 Wall.) 629, 632, 21 L. Ed. 927, the Supreme Court said: 'In Pennsylvania, it is true, set-off is allowed in cases where the claims are not mutual, and, in that State, under the decisions there, it is probable that set-off would be allowed in such a case as this. But we do not regard the rule adopted in Pennsylvania as in accord with the general rules of equity which govern cases of set-off. We think the general rule is stated by Justice Story, in his treatise on Equity Jurisprudence, where he says: 'Courts of equity, following the law, will not allow a set-off of a joint debt against a separate debt, or conversely, of a separate debt against a joint debt; or, to state the proposition more generally, they will not allow a set-off of debts accruing in different rights'' . . .

"These rulings impliedly recognize that the

United States courts exercise an independent judgment on matters of set-off and do not follow the decisions of the state courts.

"If the determination of this question involves an interpretation of the national banking laws, which it seemingly does, then the United States law controls. In McCandless v. Dyar (D. C.) 34 F. (2d) 989, 991, defendant was indebted to a national bank. He set up as a defense thereto a claim in the nature of a set-off for money paid by him as a guarantor of the bank. The court said:

"'Has this defendant the right of set-off under the circumstances pleaded in this action, brought by the receiver upon his indebtedness to the bank? . . .

"'The right to the allowance of such an off-set in the case at bar must be determined in the light of the statutes of the United States controlling suspended national banks in the hands of a receiver appointed by the Comptroller of the Currency, and especially the provisions of the United States statutes prohibiting preferences in the liquidation of national banks.' . . .

"In the United States courts there must be mutuality of right before a set-off can be asserted."

After citing the excerpt from Scammon v. Kimball, Assignee, 92 U. S. 362, 367, we heretofore quoted in our brief, the court continued at page 14:

"In Western Tie & Timber Co. v. Brown, 196 U. S. 502, 25 S. Ct. 339, 49 L. Ed. 571, a bank-

rupt was indebted to the timber company. The timber company was indebted to the bankrupt as trustee. It was held the timber company could not set off the trustee debt against the individual debt.

"In United States v. Butterworth - Judson Corp'n et al., 267 U. S. 387, 395, 45 S. Ct. 338, 340, 69 L. Ed. 672, it is stated: 'A bank having notice that a deposit is held by one for the use of or as security for another has only such right of set-off as is not inconsistent with the rights of the latter.'

"The foregoing cases in principle rule that defendant cannot set off its deposit in the Bank of Pittsburgh, N. A., as trustee against the deposit of the Bank of Pittsburgh, N. A., with defendant in its own right.

"The principle laid down in the foregoing cases is the law of Pennsylvania. On June 27, 1932, the Supreme Court of Pennsylvania, in William D. Gordon v. Union Trust Company, 308 Pa. 493, 162 A. 293, 294, a case identical in principle and almost parallel in facts, speaking by Mr. Justice Kephart, said:

" 'The Commercial Trust Company deposited $6,429.50 with the Union Trust Company, the account being styled 'Commercial Trust Company Trust Funds'. The Union Trust Company had $6,808.45 on deposit with the Commercial Trust Company, this account being styled 'Union Trust Company Trust Funds'. It is conceded that both deposits represented trust funds of the respective institutions, and, as such, were the property of various cestuis que trust or beneficiaries of each bank.

" 'Union Trust Company was, and still is, a solvent going concern. Commercial passed into the hands of the secretary of banking because of impairment of capital. The secretary drew on Union for the trust funds of Commercial which it held. Payment of his draft was refused since Union claimed a set-off against it because of the trust fund deposit it had in Commercial. The court below refused to permit the set-off for the reason that it did not appear that there was mutuality of demand both as regards the quality of the right and the identity of the parties.

" 'The statutes and orders of the banking department have resulted in a general practice among trust companies of depositing trust funds exactly as was done in this case. The beneficial owners of Commercial's trust account are A, B, and C; their money is in the Union Bank. The beneficial owners of Union's trust account are X, Y, and Z, and their money is in the Commercial Bank. Strike the trust companies out of the picture, as they are only trustees holding legal title, and the matter is reduced to its simplest form. What is then asked in the set-off is that the money of A, B, and C, be used in part to pay the debts to X, Y, and Z. This we held in Hunter v. Henning, 259 Pa. 347, 103 A. 61, could not be done. Appellant attempts to limit that decision to its facts inasmuch as the trust accounts were there plainly earmarked, but as we said in Trestrail v. Johnson, 298 Pa. 388, 148 A. 493, 494: "Generally speaking, in all cases where the ownership of the fund itself has been in dispute, and not the right to administer it, the court has been particular to do nothing which would disturb in the slightest the fund reaching its des-

tined lawful end, without unnecessary risks that might come if a more liberal policy was adopted; it being conceded the fund was a trust or one that can be called such".

" 'The question here then is one of ownership, not one of determining the status of a deposit between the bank and the depositor. The underlying equitable principle set forth in Trestrail v. Johnson, supra, controls. *The names in which suit could be brought and defended furnish an indication, but are not the only criterion, of the right of set-off. To whom do the funds really belong? Mutuality of right in a set-off is not circumscribed by the 'right to bring an action', but the broader question may be, and generally is, of importance. Whose money or claim is proposed to be used as a set-off? This is the true equitable principle which governs such questions.* . . .

"If the deposit of the Potter Title & Trust Company in the Bank of Pittsburgh, N. A., had been of its own money, it would have been entitled, under the law, to set off the same against the deposit of the Bank of Pittsburgh, N. A., of its money in the Potter Title & Trust Company, although the result might be that the Potter Title & Trust Company would receive its entire deposit while other depositors of the Bank of Pittsburgh, N. A., might receive only a portion of their deposits. *But the deposit of the Potter Title & Trust Company in the Bank of Pittsburgh, N. A., was not of its own money, but it was of the money of other persons in which it had no interest other than as trustee or agent. Why should the deposit of such persons be paid in full when such payment may work a preference as against other*

> *depositors and creditors of the Bank of Pittsburgh, N. A.?* Such a result would be unjust, and is contrary to the decisions of the United States and Pennsylvania courts."

The general principle of mutuality in quality of right in offset is succintly expressed in Olmstead v. Scutt, 55 Conn. 125, 127:

> "One of the first and fundamental principles of set-off is, that the demand must be due the party in his own right, either as original creditor or as owner by assignment. The ownership must be such as to stand these two tests: 1st. Could he bring a suit in his own name as plaintiff? 2d. *If he could, would the avails recovered be for his own use, pleasure and benefit?* Parsons on Contracts, (5th Ed.) top page 737." (Italics ours).

Again adverting to the question of mutuality in quality of right, we believe this requirement is based on a sound legal question, "to whom does the money or the claim actually belong, or differently stated, is the party seeking to obtain the benefit of the offset the real owner of the claim?" The rule is previously, but well stated, in Olmstead v. Scutt, 55 Conn. 125, 127.

And, in an early case in Michigan, the Supreme Court of that state held, in McGraw v. Pettibone, 10 Mich. 530, 537;

> "It is a rule to which no case recognizes an exception—so far as we have been able to discover—that the party who seeks to obtain the

> benefit of a set-off, must be the real owner, and have the control of the counter claim, so that his creditor who sues him is his debtor as to the claim offered in reduction: 2 Pars. on Cont. 243."

It seems to us that the preferable rule, for which authority exists in both the Federal and state courts, Thomas v. Potter Title & Trust Company, supra; Gordon v. Union Trust Company, supra, and McGraw v. Pettibone, supra, is that a set-off cannot be sustained unless the party seeking to obtain the benefit of the set-off is the real owner of the claim, and is equitably entitled to the funds sued for, which he may use as his own. It would appear obvious that if mutuality in quality of right is an essential element in establishing the right to set-off then the conclusion of the lower court that it was a matter of no concern to the appellant that the Clearwater bank held the checks for its depositors for collection, or for value, was an erroneous premise, which led the court into error.

Before passing on to a discussion of the law respecting ownership of the items in question, it should be noted that the law of set-off also requires mutuality of parties. In Gray v. Rollo, 18 Wall. 629, 632, the court held:

> "Courts of equity, following the law, will not allow a set-off of a joint debt against a separate debt, or conversely, of a separate debt against a joint debt; or, to state the proposition more generally, they will not allow a set-off of debts accruing in different rights."

And in Beauregard v. Case, 91 U. S. 134, 141, it was said:

> "That indebtedness was not compensated and extinguished by operation of law by the indebtedness at the time of the bank to May, if such existed. Personal debts are only set off to each other, or compensated the one by the other, by operation of law, when they are of the same personal character. A partnership debt is not thus offset or compensated by a demand of one individual member against the creditor. There is no mutuality in such cases between the parties."

It is here urged that where ownership of the claim is shown in parties other than the defendant claiming the set-off right, thus establishing the lack of mutuality in quality of right for offset purposes, it follows as a matter of law, that mutuality of parties does not exist and on that ground the request for the allowance of set-off fails.

That the right to set-off must exist at the moment of insolvency and suspension, for the rights of the parties are fixed as of that time, is a proposition so well settled by repeated decisions of this court as not to need argument. Scott v. Armstrong, 146 U. S. 499, Yardley v. Philler, 167 U. S. 344, Davis v. Elmira Savings Bank, 161 U. S. 275.

(5) *The character of the contract, respecting ownership of the items deposited, discussed, in connection with the relation between the Clearwater bank and its depositors in the transaction.*

Proceeding upon the principle stated under Subdivision IV of the Argument, supra, that mutuality in quality of right is essential to the establishment of the legal right to set-off, and that, in determining the existence of this element the inquiry must be directed to the question of ownership of the items deposited, it is submitted that the relation between the Clearwater bank and its customers from the moment of the deposit of the items with the Clearwater bank to the date of suspension of the St. Petersburg bank was one of agency, under which relation the Clearwater bank was a mere collecting agent for its customers without any interest in, or title to, the items deposited.

Concerning the deposit of commercial paper in a bank the general rule is stated by this court in City of Douglas v. Federal Reserve Bank of Dallas, 270 U. S. 489, 70 L. Ed. 1051, 1053:

> "When paper is indorsed without restriction by a depositor, and is at once passed to his credit by the bank to which he delivers it, he becomes the creditor of the bank; the bank becomes owner of the paper, and in making the collection is not the agent for the depositor. Burton v. United States, 196 U. S. 283, 49 L. Ed. 482, 25 Sup. Ct. Rep. 243; . . ."

However, as stated in Federal Reserve Bank v. Malloy Brothers, 264 U. S. 160, 68 L. Ed. 617, the rule may, of course, be varied by contract, express or implied. At page 164, the court said:

> "Here the relations of the payee to the ini-

tial bank of deposit are controlled by the Florida statute with respect to which it must be presumed they dealt with each other."

With reference to a similar situation the United States Circuit Court of Appeals for the Fifth Circuit (involving the same insolvent national bank), in the recent case of City of Miami v. First National Bank of St. Petersburg, 58 Fed. (2) 561, 562, stated:

> "It is held generally that a bank receiving items for collection and remittance is before collection the agent of the sender or the owner of the item, according to whether the New York or the Massachusetts rule applies. Marine Bank v. Fulton County Bank, 2 Wall. (69 U. S.) 252, 17 L. Ed. 785; Commercial Bank v. Armstrong, 148 U. S. 50, 13 S. Ct. 533, 37 L. Ed. 363. In these cases it was said that this relation of principal and agent continues after collection as to funds collected with the consequent duty of holding them for, and sending them to, the principal, unless there is an agreement as there was in those cases, express or implied, as to the funds after collection, raising the relation of debtor and creditor.
>
> "It is also the rule in those jurisdictions where the Massachusetts rule prevails that banks receiving items for collection may select the other banks to act as subagents for the owner of the item, and that these banks so selected, in the absence of other agreement, represented, not the forwarded, but the owner of the item. This is the rule in Florida by statute. Federal Reserve Bank v. Malloy, 264 U. S. 160, 44 S. Ct. 296, 68 L. Ed. 617, 31 A.L.R. 1261; Atlantic Nat. Bank v. Pratt, 95 Fla. 822,

116 So. 635; Edwards v. Lewis, 98 Fla. 956, 124 So. 746; Myers v. Federal Reserve Bank (Fla.) 134 So. 600."

The state rule is indicated by the following excerpt appearing in the case of Edwards v. Lewis, 98 Fla. 956:

> "In the case of Montsdoca v. Highlands Bank & Trust Company, 85 Fla. 158, 95 So. 666, 667, this court, in an opinion prepared by Mr. Justice Whitfield, stated that the statute above quoted makes the bank in which a check is deposited for deposit or collection liable only after actual final payment is received by it 'unless it is negligent in its duty according to the regular course of business of banks' and that the statute controls, and the decision in Brown v. Peoples Bank for Savings of St. Augustine; 59 Fla. 163, 52 So. 719, 52 L. R. A. (N. S.) 608, is not applicable. In other words, the statute has changed the rule so that now the relationship of the depositor of commercial paper with his bank of deposit, even though the deposit is not for collection, is in the nature of principal and agent, until such paper has been collected and payment actually received by the bank, in which event, the depositor becomes the creditor of his bank, the debtor."

The transaction in the case here presented is governed by Section 6834, Compiled General Laws of Florida, 1927, as follows:

> "When a check, draft, note or other negotiable instrument is deposited in a bank for credit, or for collection, it shall be considered

due diligence on the part of the bank in the collection of any check, draft, note or other negotiable instrument so deposited, to forward en route the same without delay in the usual commercial way in use according to the regular course of business of banks, and the maker, endorser, guarantor or surety of any check, draft, note or other negotiable instrument, so deposited, shall be liable to the bank until actual final payment is received, and when a bank receives for collection any check, draft, note or other negotiable instrument and forwards the same for collection, as herein provided, it shall only be liable after actual final payment is received by it, except in case of want of due diligence on its part as aforesaid."

Plaintiff's replications to defendant's IV, V, VI and VII pleas, (R. 7-10) and plaintiff's replication to defendant's III plea (R. 13-14) allege, and the demurrers thereto admit, that the checks or drafts which the Clearwater bank sought to set off against the St. Petersburg bank's claim were *"deposited with the defendant, Peoples Bank of Clearwater, for collection, which last mentioned checks or drafts were forwarded by defendant to the First National Bank of St. Petersburg"*, for collection and remittance. Under Section 6834, as construed by this honorable court, by the United States Circuit Court of Appeals for the Fifth Circuit, and by the Supreme Court of Florida, *the title to the checks or drafts sought to be made the basis of a plea of set-off by the Clearwater bk. was unquestionably in the customers of that bank,* and not in the bank at the time the St. Petersburg bank closed.

It is conceded that the right to set-off exists in the Clearwater bank's customers in the event these customers' indebtedness to the St. Petersburg bank is affirmatively established, and this conclusion, in itself, negatives the existence of a right to set-off in the Clearwater bank.

(6) *The right to set-off discussed, where beneficial ownership of the claim vests, not in the Clearwater bank, but in its depositors.*

(a) We consider the reasoning adopted and the doctrine established by the court below is expressly refuted by the United States Circuit Court of Appeals for the Fourth Circuit in Federal Reserve Bank of Richmond v. Early, 30 Fed. (2) 198, where this identical question was presented. The court, in discussing the fundamental principle here involved, said:

> "On the second question, we do not think that the Reserve Bank has the right to set off the balance due by the insolvent bank on the checks against its stock liability. The Reserve Bank was not the owner of these checks. It was merely an agent for collection, and, although it credited them to the accounts of the forwarding banks this was upon agreement that they might be charged back, if not collected, and the second lot of checks has been charged back. . . . It is perfectly clear that the liability of the insolvent member bank for these checks is a liability owing to the owners of the checks, in which the Reserve Bank is not interested, except as collection agent, and is not "a debt of the insolvent member bank to the Federal Reserve Bank," within the meaning of the statute.

> "Even in the absence of a statutory direction as to how the liability should be applied, a set-off of checks held for collection against such a liability would not be allowed, for the reason that demands to be set off against each other must be mutual; that is, they must be due to and from the same parties and in the same capacity."

It is respectfully urged that the correct rule of law governing the transaction here presented is that the Clearwater bank was the collecting agent for its customers of the items deposited by reason of the Florida statute, which controls, and, by reason of this relationship, it results that beneficial ownership of such items remained in the bank's customers until collection thereof was made by the Clearwater bank in cash or solvent credits; and, inasmuch as this result never occurred, the agency relation of the bank continued to exist down to the moment of insolvency and suspension of the St. Petersburg bank, at which time the Clearwater bank held the remittance drafts as trustee for the beneficial owners of the items, its depositors, *in which situation neither mutuality in quality of right nor mutuality in parties for offset purposes existed, and the allowance of the set-off claimed would constitute an illegal preference to the Clearwater bank's customers over other creditors of the insolvent St. Petersburg bank,* in direct violation of the ratable distribution rule required by the National Bank Act.

ANALYSIS OF CASES SEEMINGLY CONTRARY TO CONTENTIONS HERE MADE BY PETITIONER.

Nomland v. First National Bank of Kansas City, Mo., 64 Fed. (2) 399.

Harry Nomland, Receiver of the State Bank of Stockton, Kansas, brought suit against the First National Bank of Kansas City, Mo., for $1,460.94 upon the following facts: "The Kansas City bank mailed a cash letter to the Stockton bank containing checks amounting to $1,460.94 drawn upon the latter bank by certain of its depositors, which checks the Kansas City bank had received from its own depositors, and had given such depositors credit upon their respective accounts, the deposit being made under the usual form of deposit slip used by the Kansas City bank, which provided that items deposited may be handled as the customer's agent, that the bank as agent, or owner, is not liable for negligence, default or failure of other banks selected as agents or subagents or for losses in transit with the right to charge back until actual cash payment is received. On November 12, 1927, the Stockton bank received said checks from the Kansas City bank, charged them to the respective accounts of its depositors, who had issued them, and mailed, on that day, a cash letter to the Kansas City bank containing a draft for $1,460.94 drawn by the Stockton bank on the Kansas City bank in remittance for said checks, and debited its own account with the Kansas City bank with that amount. On that date, and prior to the time of drawing the draft, the Stockton bank had to its credit with the Kansas City bank the sum of $3,592.62. On Monday morning, November 14, 1927, the Kansas City bank received the cash letter and the draft from the Stockton bank but be-

fore it had made any entry or record of the receipt of the draft the Kansas City bank received a telegram from the national bank examiner in charge advising it that the Stockton bank had closed and to withhold payment on all outstanding drafts. The Stockton bank did not open for business on November 14, 1927. The reasoning of the court follows: That assuming mutuality of debtor-creditor relation is a prerequisite to the right of set-off, the answer to the question as to the set-off right existing depends upon ownership of the checks transmitted from the Kansas bank to the Stockton bank; that the unrestricted endorsement of the checks by the Kansas bank's customers passed title to the Kansas bank; that the deposit contract did not create an agency relation, and since the Kansas bank was the owner of the checks the moment the Stockton bank collected them by simply making proper entries on its books, there arose between the Stockton bank and the Kansas City bank the mutual relation of debtor - creditor and the right of set-off arose in favor of the Kansas bank, which was not defeated by the subsequent insolvency and suspension on the part of the Stockton bank.

While we do not concede that the deposit contract there under consideration did not represent a special agreement controlling ownership of the items deposited, St. Louis, etc. Railway v. Johnston, 133 U. S. 566, we assert that the basic principle for which we now contend was there decided in our favor, following Hirning v. Federal Reserve Bank, 52 Fed. (2) 382, to the effect that the relationship of the parties determines the right to set-off, hence where ownership of

the items, under a collection agreement, is established in the bank's customers, set-off is not available, but where ownership is shown to be in the bank set-off is available. In order to find for the Kansas bank the court found it necessary to determine ownership of the items in that bank, and having reached this conclusion we agree that the right to set-off followed. As a matter of law it will be noted that had the court reached a different conclusion on the question of ownership a contrary result would have followed, in order for the court to be consistent. Bosworth v. Continental Illinois Bank & Trust Company, 65 Fed. (2) 632. (Petition for certiorari now pending in this court.)

In this case the receiver of the McCartney National Bank of Green Bay, Wisconsin, brought suit to recover its credit balance in the Continental Illinois Bank & Trust Company and the latter bank pleaded its right to set-off, against such deposit balance, a draft in the sum of $10,823.14 issued by the McCartney National Bank on the Federal Reserve Bank of Chicago in favor of the Continental Illinois Bank & Trust Company, which failed payment by reason of the closing of the national bank. The draft represented attempted payment for checks drawn on the McCartney National Bank, which had been deposited in the Continental bank under an agency contract, and forwarded by the Continental bank to the McCartney bank for collection and remittance. In allowing the set-off the Circuit Court of Appeals for the Seventh Circuit followed A. M. Anderson, Receiver, v. Taver Bayly, 63 Fed. (2) 592 (the case

now under consideration), and Nomland, Receiver v. First National Bank of Kansas City, 64 Fed. (2) 399. The court held that these two cases dealt with somewhat similar fact situations and were favorable to the Continental Bank. In view of the fact that certiorari has been granted in the first case, and is now being argued on the precise question involved in the McCartney - Continental case, and that in the Nomland-First National Bank case ownership of the items was determined in favor of the Kansas bank, it is denied that these cases are authority for the decision reached by the Circuit Court of Appeals for the Seventh Circuit, and it is respectfully submitted, for the reasons set forth in the pending case, that the court there reached an erroneous conclusion as a matter of law.

THE FACT THAT THE ST. PETERSBURG BANK HAD FORWARDED ITS DRAFT IN PAYMENT OF THE CASH LETTER DISCUSSED.

Inasmuch as the drafts forwarded by the St. Petersburg bank were not paid the relation between that bank and the Clearwater bank was not changed, for under the agency contract the Clearwater bank's customers were entitled to get what their bank had received at the moment of the insolvency and suspension of the St. Petersburg bank, or, in other words, the beneficial owners of the items deposited for collection and credit then became the beneficial owners of the drafts, upon which they or the bank as their agent, may prove their claim against the assets of the insolvent bank in the hands of the Comptroller's receiver. It thus results that they are remitted to the

general funds, unless they are able to prove the elements essential to the allowance of a preferred claim, trust relationship, augmentation and tracing, on the authority of Larabee Flour Mills v. First National Bank of Henryetta, 13 Fed. (2) 330, certiorari denied, 47 Sup. Ct. 238, U. S. 727, Blakey v. Brinson, 286 U. S. 254, 76 L. Ed. 1089, Hirning v. Federal Reserve Bank, 52 Fed. (2) 382, Empire State Surety Company v. Carroll County, 194 Fed. 593, Mark v. Westlin, 48 Fed. (2) 609, Mac Donnell v. Guy, 63 Fed. (2) 334, Schilling v. Rowe, 64 Fed. (2) 188, Beard v. Independent District of Pella City, 88 Fed. 375. Collection having been effected by a transfer of credits on the books of the St. Petersburg bank the settled Federal rule classifies the claims of the Clearwater bank's customers as general only.

ANALAGOUS PRINCIPLES OF LAW, REPRESENTING QUASI FIDUCIARY RELATIONSHIPS IN OFFSET, DISCUSSED.

It is difficult to understand why the principles of law in the case now under consideration are different, when considering the rule of law governing set-offs, from the settled rule of law firmly established in both Federal and state courts in this country in quasi fiduciary relationships. It would seem clear that, since the Clearwater bank held the items deposited, and the draft remitted in payment thereof, under an agency relation, the Clearwater bank was a trustee for the beneficial owners, its customers, and, as such, is in no other or different relation, in applying the rule of law in set-off, from any other person holding property in a fiduciary capacity.

The principle governing set-off in cases involving fiduciary funds was first established in Wilson v. Codman's Executor, 3 Cranch 193, 203, in this colloquy between counsel and the court, during argument:

> "Simms, Counsel — No set-off against the trustee can be set up against the cestui que trust. The authorities cited in Winch and Keely can be produced, if the court should require it.
>
> "Marshall, Ch. J. — There is no necessity to produce authorities. There can be no question on that point. If the agent, appointed to collect a debt, is indebted to the debtor, the latter cannot offset, against the debt due from him to the principal, claims against the agent. It cannot be contested."

Then, in Hanover National Bank v. Suddath, 215 U. S. 122, the court held that where a bank, after refusing to discount paper sent to it by the insolvent while a going concern, for that purpose, has retained the paper, it cannot, as against general creditors, set off against that paper or its proceeds, the bankrupt's overdraft, although made after such refusal and pending the retention of the paper. This holding by the court was restated in the case of In Re G. F. Redmond & Company, Inc., 17 Fed. (2) 501, 502:

> "The contention of the trustees relative to this right of set-off is based on a well settled doctrine that a simple debt cannot be set off against a quasi fiduciary obligation, such as Ginsburg owed the bankrupt corporation. Western Tie & Timber Co. v. Brown, 196 U. S.

502, 25 S. Ct. 339, 49 L. Ed. 571; Libby v. Hopkins, 104 U. S. 303, 26 L. Ed. 769; Hanover Nat. Bank v. Suddath, 215 U. S. 122, 30 Sup. Ct. 63, 54 L. Ed. 120."

And in an early Federal District Court case, The Zouave, 29 Fed. 296, 298, the rule is stated:

> "To authorize a set-off the debts must be between the parties in their own right, and must be of the same kind or quality, and be clearly ascertained or liquidated . . . And by the civil law it was necessary that the debt or claim, to be compensated, should be certain and determinate, and actually due, and in the same right and of the same kind as that on the other side. Story, Eq. Jur. Sec. 1441."

The principle that a simple debt cannot be set off against a quasi fiduciary obligation has been repeatedly followed in state cases, and it applies to executors, see Dale v. Cooke, 4 Johns. Ch. (N. Y.) 11, 16, where Chancellor Kent says:

> "Here was an application to set off a debt arising on a contract with an executor, against a debt arising on a contract with a testator. They are not debts due to and from the same persons, in the same capacity, and there is no mutuality."

which holding was followed by Starke v. Myers, 53 N. Y. S. 650, 651, to the effect that:

> "It is well settled that claims against an executor or administrator individually cannot be offset against claims in his favor in a representative capacity as trustee for the estate."

and the case of Laighton et al., Executors, v. Brookline Trust Company, 225 Mass., 458, at page 460, 114 N. E. 671, where it was held:

> "We think that the right to set-off is limited to the balance of the deposit as it existed at the time of the testator's death. It could not successfully be contended that if, upon the appointment of the plaintiffs as executors, they had opened a new account and made deposits therein, the defendant could have set off its claim against such account . . . To hold otherwise would permit the defendant to obtain an inequitable preference which would be unjust to other creditors."

The rule is applicable to trustees, see Harris v. Elliott et al., 48 N. Y. S. 1020, 1021, where the court stated:

> "It is clear, as a matter of law, that the plaintiff cannot, as against the beneficiaries of a fund which he holds in trust, offset a personal claim; or, to express it differently, a trustee cannot set off his personal claims against a beneficiary so as to avoid payment of a balance due by him as trustee."

Likewise, in Ellis v. Baker-Matthews Lumber Company, 248 S. W. 7, 10, it was determined that:

> "A trustee cannot set off against the trust indebtedness an independent debt due him individually. The trustee is not a debtor. Therefore, any debt owing by him or due to him individually is not due in the same right or capacity as a trustee, and lacks mutuality."

and in Kaye v. Metz, 198 Pac. 1047, 1049, where the court, in denying set-off to creditors of an insolvent corporation for their claims against their unpaid holdings in the corporation, said:

> "A creditor stockholder would thus obtain a preference. In order to warrant a set-off," the debts must be mutual, and the principle of mutuality requires that the debts should not only be due to and from the same person, but in the same capacity." 19 Cyc. 894. The trustee in bankruptcy held these stock liabilities, as above stated, as trust funds for the benefit of creditors."

A similar result was reached in Mahon v. Harney County National Bank, 206 P. 224, 227:

> "There is no right of set-off against a trustee depositor. Sanford v. Pike, 87 Ore. 614, 170 Pac. 729, 171 Pac. 394; Cent. National Bank v. Conn. Mut. L. Ins. Co., 104 U. S. 54, 26 L. Ed. 693; Union Stockyards Nat. Bank v. Gillespie, 137 U. S. 411, 11 Sup. Ct. 118, 34 L. Ed. 724. In order to counterclaim, the debt must be between the same parties and the same right."

and the general rule is announced by the Supreme Court of Massachusetts in Bates v. Cosmopolitan Trust Co., 133 N. E. 758, 760:

> "Except under special circumstances and where the proofs are clear and the equity very strong, equity, following the law, will not allow a set-off in different rights than is allowed by the enacted statutes of set-off. Jump v. Leon,

192 Mass. 511, 78 N. E. 532, 116 Am. St. Rep. 265; Perry v. Pye, 215 Mass. 403, 102 N. E. 653; Scammon v. Kimball, 92 U. S. 362, 367, 23 L. Ed. 483."

It is seriously contended that no essential difference exists between persons holding funds in a fiduciary capacity, such as executors, administrators, trustees, guardians and public officers, and a bank holding funds or property of its customers or depositors under a trust relationship created through an agency contract. We believe this court so indicated in Hanover Nat. Bk. v. Suddath, 215 U. S. 122, where it declined to sanction a set-off of credit instruments held in trust against the insolvent bank's indebtedness to the holder of the discount paper which the Hanover Bank had refused to discount. To enforce any other rule would, of necessity, create a preference to the detriment of the general creditors of the insolvent bank.

CONCLUSION.

It is respectfully submitted that the foregoing discussion discloses that the right to set-off does not exist in the present case; that the Clearwater bank was not the beneficial owner of the items deposited by its customers, or the remittance drafts forwarded in payment thereof; that neither mutuality in quality of right nor of parties exists in this case, and that the allowance of set-off contravenes the ratable distribution section of the National Bank Act; that the lower court's ruling is in direct conflict with fundamental principles of law controlling decisions of the

Federal courts; and that an affirmance of the lower court's decision will, in effect, overrule the settled law in this country respecting the allowance of set-off in the Federal courts, and adversely affect the interests of creditors of about two thousand national banks now in the hands of the Comptroller of the Currency and his receivers.

It is respectfully submitted that the decision of the lower court should be reversed.

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